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IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

Amici are law professors who teach and write in the field of federal jurisdiction.[1] William Araiza is Vice Dean and Professor of Law at Brooklyn Law School. Howard M. Wasserman is Professor of Law at Florida International University College of Law. Lawrence Sager holds the Alice Jane Drysdale Sheffield Regents Chair at the University of Texas School of Law. Stephen I. Vladeck is Professor of Law at American University's Washington College of Law. Ernest A. Young is the Alston & Bird Professor at Duke Law School.

For decades, this Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), has stood as a central affirmation of judicial independence; its precise holding, however, has been the focus of considerable speculation and disagreement. *Amici* believe that, while disagreement persists among scholars about the scope and theoretical underpinnings of *Klein*, there is also widespread agreement about certain core principles. This brief attempts to articulate those principles and bring them to bear on the present case.

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[1] This brief has been filed with the written consent of the parties, which filed blanket consents with the Clerk of Court. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

STATEMENT

The statute at issue in this case embodies an appealing policy choice. Respondents here represent victims of state-sponsored terrorism who have obtained default judgments against the Islamic Republic of Iran. Under existing rules of law, Iran possesses no assets within the United States that Respondents may reach to satisfy those judgments. Nonetheless, Respondents brought suit in the United States District Court for the Southern District of New York, attempting to reach almost $2 billion in assets held, through a series of intermediaries, by Petitioner, the National Bank of Iran. Respondents' prospects in that suit were bleak until Congress intervened through a special provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, codified at 22 U.S.C. § 8772, that required the district court to permit Respondents to reach the assets in question.

Amici have little sympathy for the plight in which Petitioner finds itself, and we readily agree with Congress that Respondents' claims cry out for compensation. But by telling a federal court how to decide a single case, and explicitly specifying that its directive would have no effect on any other parties, assets, or controversies no matter how similarly situated, Congress offended two bedrock principles of judicial independence. First, as this Court held in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), Congress may not direct the resolution of a pending case in an Article III court without amending the underlying law. And second, even when Congress *does* enact new law, it must act generally and not with respect to a single case. When Congress

disregards these principles, as it did in the wake of the Civil War, it will often have an appealing case on policy grounds and the parties on the receiving end will often be unattractive. But the core notion of constitutionalism is that we insist on observing constitutional limitations even when the equities of the particular case push most strongly in the other direction.

Like other separation of powers problems, threats to judicial independence often come before this Court "clad, so to speak, in sheep's clothing." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Congress may limit federal jurisdiction in certain cases, assign a limited class of claims to non-judicial actors, or play with standards of review. But here, Congress has taken a single case and told the courts how to decide it—a core violation of our most fundamental commitment to judicial independence and integrity. As Justice Scalia has said in another context, "this wolf comes as a wolf." *Id.*

ARGUMENT

Section 8772 violates two closely related principles vital to the separation of powers. First, Congress may not direct the result in a pending case without amending the underlying law. And second, even if it does amend the underlying law, Congress may not do so in a way that applies only to a single case. Whatever else the separation of powers may require when Congress acts in a way that impacts pending litigation, judicial independence surely demands this much. And it is difficult to imagine a statute that would violate these principles more blatantly than the one at issue in this case.

I. Section 8772 violates the principle that Congress may not direct the result in a pending case without amending the underlying law.

This Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), has long been one of the most mysterious and fascinating cases in the Federal Courts canon. Scholars have offered a wide range of diverse and often conflicting interpretations of its meaning. But there has generally been a core of widespread agreement that, whatever else *Klein*'s language and holding may entail, it stands at a minimum for the proposition that Congress may not direct the result in a pending case without amending the underlying law.[2] This principle is generally taken to be quite narrow, given that Congress may amend the law in ways that foreseeably affect pending litigation. But the general idea that Congress may not tell a court how to apply the *existing* law—much less instruct a court to disregard that law—is foundational to judicial independence and the rule of law. And this case plainly violates it.

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[2] *See, e.g.*, Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. Nat'l Sec. L. & Pol'y 251, 252–53 (2011); Howard W. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 69-70 (2011); Evan H. Caminker, Schiavo *and* Klein, 22 Const. Comment. 529, 533 (2005); William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1079, 1088 (1999); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 718-21 (1995).

A. *United States* v. *Klein* is best understood to forbid Congress from directing the result in a pending case without amending the underlying law.

During the Civil War, Congress enacted the Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863), which provided an opportunity for persons whose property was seized in the rebellious states to obtain the proceeds from sale of that property if they could prove that they had not "given any aid and comfort" to the rebellion. Shortly thereafter, President Abraham Lincoln issued a presidential proclamation offering a full pardon—including restoration of rights in seized property—to persons who had been engaged in the rebellion if they took a new loyalty oath. Some years later, in *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that a person taking such an oath and receiving a pardon would be deemed legally loyal, and therefore entitled to restoration of property under the Abandoned and Captured Property Act. The Reconstruction Congress, generally skeptical toward President Andrew Johnson's conciliatory policy toward the conquered South, responded by enacting a statute barring the use of a pardon to prove loyalty, taking a pardon to be conclusive proof that the claimant *had* been disloyal in fact, and requiring the federal courts to dismiss claims predicated on a pardon for want of jurisdiction.[3]

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[3] *See generally* Wasserman, *supra* note 2, at 59-63; Amanda L. Tyler, *The Story of* Klein: *The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in *Federal Courts Stories* 106 (Vicki C. Jackson & Judith Resnik eds., 2009).

This Court struck down that statute in *Klein*. The Court held that Congress's action was not a valid "exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" of the Supreme Court. *Klein*, 80 U.S. (13 Wall.) at 146. Even though Congress may have broad power to restrict federal judicial jurisdiction,[4] Chief Justice Chase wrote that Congress may not "prescribe rules of decision to the Judicial Department . . . in cases pending before it." *Id.* Under the statute, "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely opposite." *Id.* at 147. By so requiring, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* Finally, the Court also suggested that by impairing the effect of a presidential pardon, the law "infring[ed] the constitutional power of the Executive." *Id.*[5]

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[4] The Court had decided *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), only two years previously.

[5] *Id.* It may be tempting to read *Klein* simply as a case about the pardon power, holding that that Congress may not impair the full effect of a presidential pardon any more than it may restrict the President's other exclusive powers. *See, e.g.*, *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015) (holding that Congress may not impair the President's exclusive power to recognize foreign nations). But Chief Justice Chase plainly raised the pardon issue in the alternative: Having found that the statute "passed the limit which separates the legislative from the judicial power," he observed that "[t]he rule prescribed is *also* liable to just exception as impairing the effect of a pardon." *Klein*, 80 U.S. (13 Wall.) at 147; *see also* Caminker, *supra* note 2, at 533 (observing that "the structure and language of the Court's opinion make clear that the two

Klein's language about "prescrib[ing] rules of decision" must be read, however, in conjunction with numerous decisions holding that Congress may amend the law governing pending litigation, and that courts must ordinarily give such amendments retroactive effect if Congress so intends.[6] *Klein* itself recognized as much by distinguishing *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). In May of 1852, the Court had held that the Wheeling Bridge was an impediment to navigation and ordered it removed. In August of the same year, however, Congress passed an act declaring that the bridge (as well as another bridge in Ohio) was a lawful structure and designating both as federal post roads. In the wake of this new statute, the Court acknowledged that its prior decree could no longer be executed, and it rejected any argument that the new law interfered with the judicial power. *See id.* at 431–32, 435–36.[7] The *Klein*

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separation of powers principles discussed in *Klein* operate in the disjunctive").

[6] *See, e.g., Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273 (1994); *see also Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 212 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

[7] As Petitioners rightly note, *see* Petitioner's Brief at 36–37, the *Wheeling Bridge* Court also emphasized that Congress's statute altered only the Court's prospective decree directing removal of the bridge. The Court suggested that the case would have come out differently had there been a claim for damages, *Wheeling Bridge*, 59 U.S. (18 How.) at 431, and in fact the Court did enforce the portion of its initial decree requiring the defendants to pay costs, *id.* at 436. But we think the critical aspect of *Wheeling Bridge* was that Congress had permanently, and for

Court found this decision perfectly consistent with its own holding. "No arbitrary rule of decision was prescribed in that case," Chief Justice Chase wrote, "but the court was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. (13 Wall.) at 146–47. In *Klein* itself, by contrast, "no new circumstances have been created by legislation." *Id.* at 147.

This Court's most recent interpretation of *Klein* shows the narrowness of *Klein*'s core principle, when read in conjunction with Congress's acknowledged power to change the underlying law. In *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), the Court considered the validity of the Northwest Timber Compromise, a federal statute modifying timber harvesting restrictions in forests home to the endangered spotted owl. The statute was enacted in response to ongoing litigation challenging whether the Bureau of Land Management had adequately considered the impact of permitted logging on the owl. As part of a compromise restricting logging in some areas and permitting it in others, § 318 of the statute designated particular portions of federal land, including that concerned in the ongoing litigation, as open to timber sales, and it mandated that management of the land pursuant to the law's new provisions would be "adequate consideration for the purpose of meeting the statutory requirements that are the basis for" the ongoing litigation, which it referred to by name and docket number. *See id.* at 433–34.

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all legal purposes, altered the underlying legal status of the bridge.

The Ninth Circuit held that § 318 violated *Klein* because it directed the resolution of a pending case without amending the underlying law, but this Court reversed. Assuming that the court of appeals' reading of *Klein* had been correct, the Court nonetheless found that the statute "compelled changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438. That conclusion, on *Robertson*'s facts, seems perfectly in line with *Klein*'s distinction of the *Wheeling Bridge* case: Congress's intervention exempted the specific provisions of the timber compromise from the general requirement that agencies consider environmental impacts; after all, Congress itself had considered those impacts in formulating the compromise. And although the compromise had the effect of eliminating the legal basis for the plaintiffs' suit, the statute changed the law governing not just that suit but any other challenge to the timber sales affected by the compromise. Hence, "[t]o the extent that [the statute] affected the adjudication of the [pending] cases, it did so by effectively modifying the provisions at issue in those cases." *Id.* at 440.

Although *Robertson* maintained *Klein*'s central distinction between directing law application and amending the underlying law, it illustrates that Congress may still achieve quite specific results when doing the latter, and those results may profoundly affect pending litigation. Critically, *Robertson* concerned the management of federal land, an exercise not of Congress's general Article I legislative powers but rather its Article IV power "to dispose of . . . property belonging to the United States." U.S. Const. art. IV, § 3. Decisions about the disposition of federal assets and resources are

necessarily more targeted than general legislation, and it may be that Congress should be held to a stricter standard when it exercises its general legislative powers.[8] But in any event, Congress's observance of the distinction between directing application and amending law maintains important separation of powers values.

B. Precluding Congress from directing results without changing the law serves important separation of powers values.

This Court's decision in *Robertson* did not expressly adopt the view that *Klein*'s prohibition turns on the difference between directing the outcome of a case and amending the underlying law; it assumed that the court of appeals had been correct in so reading *Klein* but found that the rule had not been violated. *See Robertson*, 503 U.S. at 441. But there is broad agreement among Federal Courts scholars that *Klein* must mean at least this much.[9] Whatever else, if anything, *Klein* may mean, its prohibition on directing results without amending the law serves critical values of judicial independence and integrity.

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[8] *Robertson* also involved the exercise of delegated authority by a federal agency. In this context, it made sense for Congress to substitute its own deliberation on the environmental impact of logging, represented by the compromise legislation, for the statutory requirements that the agency consider those impact that formed the basis of the plaintiffs' suit. Congress was not substituting its judgment for the courts', but rather for the agency's judgment within the framework of a statutory solution to a political controversy over the agency's actions. That, of course, is not this case.

[9] See sources cited in note 2, *supra*.

At least two sets of separation of powers values are salient in this context. The first concerns the protection of litigants from an adjudication process dominated by majoritarian politics. When Congress amends the underlying law, it necessarily deals with the subject of legislation in a more general way than when it simply directs the outcome of a pending case. Congress may be able to foresee the impact of the law on the present litigation, but it must also contemplate that, having been amended generally, the law may govern other unforeseen cases in the future. Even in *Robertson*, the specific mention of the pending cases in the statute was merely illustrative; the act's provisions nonetheless governed any other litigation that might arise concerning the affected timber sales.

The Founders were concerned that the early state legislatures had too often taken judicial matters into their own hands.[10] James Madison thus had this abuse, among others, in mind when he wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[11] Our Constitution requires the concurrence of multiple institutional actors before individuals may be

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[10] *See* Federalist No. 48, at 310-12 (Isaac Kramnick ed., 1987) (1788) (James Madison); *see also Plaut* v. *Spendthrift Farm, Inc.* 514 U.S. 211, 221-22 (1995) (collecting sources); *INS* v. *Chadha*, 462 U.S. 919, 960-62 (1983) (Powell, J., concurring in the judgment) (same).

[11] Federalist No. 47, at 303 (Isaac Kramnick, ed., 1987) (1788) (James Madison).

deprived of liberty or property.[12] This forces legislators, to at least some extent, to enact laws behind a veil of ignorance, knowing that those laws may well be applied to their own constituents or supporters.[13] And it assures individuals that when the law is actually applied to them, it will be in a judicial forum with all the procedural protections that such a forum affords.[14]

The second set of values involves the independence and integrity of the courts themselves. The judiciary's power "to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is the power not to make law but to interpret and apply it according to the court's own best judgment. Changing the applicable law does not intrude on that judgment. But telling a court what outcome to reach, what legal conclusions to draw, or how to apply the existing law to facts compromises the independence and integrity of the courts. Judicial legitimacy rests critically on the neutral application of general principals. Herbert Wechsler famously

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[12] *See, e.g.*, *United States* v. *Brown*, 381 U.S. 437, 443 (1965) ("For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legialative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.").

[13] *See, e.g.*, *Cruzan by Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (explaining how the requirement that legialatures may not control to whom the laws will be applied prevents abuse of power).

[14] *See Chadha*, 462 U.S. at 966 (Powell, J., concurring in the judgment) (noting the lack of procedural safeguards when legialatures directly effect deprivations of rights).

said "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[15] If Congress may require a court to reach a particular result, without providing a neutral principle on which to rest that decision, then little would remain of Professor Wechsler's notion.

Moreover, this threat to judicial integrity is also a threat to the mechanisms of accountability that ordinarily discipline the democratic process. Congress does not have the same obligation of principled decisionmaking that courts do. But it should not be able to evade democratic responsibility for the choices it makes by misrepresenting those choices as judicial decrees. As Henry Hart explained over a half-century ago,

> It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate. In the former instance, by wholly excluding the federal courts, Congress loses its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes. In contrast, where Congress employs the federal courts to implement its

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[15] Herbert L. Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959).

> deception, the harmful consequences to that judicial integrity are far more significant.[16]

As Professor Hart suggested, Congress may seek to evade responsibility for its laws by contriving that they be announced as legal judgments. That undermines not only the integrity of the courts' decisional processes but also the operation of democratic accountability on the legislative side.

This Court has affirmed the institutional independence and integrity of the Article III courts in ringing terms in cases like *Plaut* v. *Spendthrift Farms, Inc.*, 514 U.S. 211, 239 (1995), and *Stern* v. *Marshall*, 131 S. Ct. 2594, 2608-09 (2011). But it does little good to prevent Congress from reopening final judicial judgments or from reassigning decisionmaking responsibility to non-Article III courts if Congress may simply tell the Article III judiciary how to decide cases in the first place. That is why scholars have interpreted *Klein* as insisting that "[t]he judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees."[17] In other words, if the

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[16] Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953); *see also* Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 Geo. L. J. 2525, 2529 (1998) (arguing that *Klein* is directed toward preventing the "co-optation of the judiciary's national authority").

[17] Sager, *supra* note 16,. at 2529; *see also* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 Nw. U. L. Rev. 437, 438-

judiciary interprets the preexisting law to require an outcome, it may not be required to reach the opposite conclusion unless that preexisting law is duly changed.

C. Section 8772 violates *Klein*'s principle by directing a result in pending litigation without amending the underlying law.

Although *amici* have spent years constructing hypotheticals to illustrate *Klein*'s meaning for our students, it is difficult to imagine a clearer violation than the present case. Generally speaking, the category of assets subject to execution in order to satisfy Respondents' default judgments would be governed by New York law, which has adopted Article 8 of the Uniform Commercial Code. As Petitioners explain, *see* Petr's Brief at 3–5, § 8-112(c) of the U.C.C. provides that a creditor may reach only those assets held by the securities intermediary "with whom the debtor's securities account is maintained." Creditors may *not* go more than one step, reaching assets held by another intermediary on behalf of the entity maintaining the debtor's account. *See* U.C.C. § 112 cmt. 3. Because Petitioner is a foreign central bank, the federal Foreign Sovereign Immunities Act provided another layer of protection for "property . . . of a foreign central bank or monetary authority held for its own account." 28 U.S.C. § 1611(b)(1).

Subsequent statutes have modified the underlying federal protections, amending the FSIA

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39 (2006) (reading *Klein* to forbid Congress from enlisting the judiciary in deceiving the electorate as to the actual state of the law).

to permit suits against foreign sovereigns for certain acts of terrorism, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241, and permitting execution against assets blocked by the President under certain economic sanctions statutes, *see* Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337. While these statutes had predictable effects on certain sorts of claims, they articulated general rules of decision. Moreover, they neither modified the rule that plaintiffs may execute judgments only against assets that actually belong to the guilty party nor provided a test for ownership independent of state law provisions like U.C.C. § 8-112.

Section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012, however, represents a profoundly different approach. That statute focused solely on particular assets against which Respondents sought execution in a particular lawsuit—identified by name and docket number in the statutory text—and directed that those assets "shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran." 22 U.S.C. § 8772(a)(1). Congress stated that its purpose was "to ensure that Iran is held accountable for paying the judgments described in paragraph (1)," as part of "the broader goals of this Act to sanction Iran." *Id.* § 8772(a)(2).

Although the line between directing a result and amending the underlying law may sometimes be fuzzy, it is not fuzzy here. Section 8772 does not articulate a new rule for when assets may be reached; it provides no new principle to replace

U.C.C. 8-112(c). Rather, it simply directs that the specific assets here "shall be subject to execution or attachment." There is no general principle whatsoever—only a mandatory result.

Moreover, the breathtaking specificity of the statute makes clear that no new law has been made. The law does not apply to a general class of assets, but rather only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b); *see also* § 8772(c)(2) (providing that "[n]othing in this section shall be construed . . . to apply to assets other than the assets described in subsection (b)"). Subsection (c) clarifies, moreover, that the statute does not "affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b)." 22 U.S.C. § 8772(c)(1). The statute is truly a ticket for this day and train only. If other terrorism plaintiffs seeking to execute identical default judgments filed an identical lawsuit, they would not get the benefit of § 8772.[18] Nor does the statute govern similarly situated claimants in any other context. If this statute is taken to amend the underlying law, then there is truly no distinction between so doing and directing the result in a pending case.

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[18] If the district court were to dismiss this action without prejudice on the basis of some technical defect in the complaint, it is not even clear that § 8772 would apply to *Respondents* after they re-filed their lawsuit.

It makes no difference that the statute leaves two determinations for the district court to make. Section 8772(a)(2) requires two judicial findings as a predicate to execution or attachment: "the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States." 22 U.S.C. § 8772(a)(2). Neither of these preconditions in this case is in dispute here—nor, of course, is the statute even applicable to any other circumstances in which they *might* be in dispute.

But in any event a *Klein* violation does not require that Congress direct *every* finding in the case.[19] Congress could not save a statute directing a particular result in a pending case simply by requiring the court to first find that it had personal jurisdiction of the dispute. Nor could Congress require a court to find the defendant liable then leave it to determine damages, or direct it to certify a particular class action, or even require the court to find against the defendant with respect to a particular defense. The offense against judicial independence occurs when Congress requires a court to resolve a particular issue in accord with Congress's wishes, rather than the court's own best view of the underlying law and facts. *Klein* does not ask for some sort of on-balance judgment as to

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[19] The statute in *Klein* itself required at least a preliminary finding that the claimant's case rested on a pardon, rather than on other proof of loyalty.

whether the court has been left with anything meaningful to do.

We do not deny that it is often difficult to draw a clear line between legislative directions to decide a pending case in a particular way under the existing law and amendments to the underlying law that effectively resolve pending cases. And in the close cases, this Court and the lower courts have generally deferred to Congress, interpreting the acts in question as legitimate examples of the latter phenomenon rather than unconstitutional instances of the former. That is all to the good. But *Klein*'s principle—narrow as it is—has stood as an affirmance of the courts' fundamental independence and a deterrent to legislation that treads close to the line. It is no coincidence that Congress rarely legislates in ways that even arguably direct a decision in pending cases. But if this Court, by upholding § 8772, tells Congress that it can tell the courts how to decide cases, then Congress is likely to tell the courts how to decide cases more often.

II. Section 8772 invades the province of the courts by purporting to legislate with respect to a single case.

Chief Justice Marshall wrote in *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments." *Id.* at 136. This principle—that legislation may invade the judicial province when it lacks a general character—is distinct from the problem in *Klein*. That case, after all, involved a general directive to resolve *all* claims for restoration

of property predicated on a presidential pardon in accord with Congress's view that pardons were proof of *dis*loyalty, contrary to the Court's prior decision in *Padelford*. The statute potentially governed a number of different suits by different claimants. Here, however, Congress has singled out a single case for its mandate. Our contention is that even if one views § 8772 as having modified the underlying law with respect to execution on assets held by intermediaries, the fact that the statute does so only with respect to *these assets* and *these parties*, and only in *this case*, is sufficient to doom the law.

A. Congress ordinarily may not legislate with respect to a single case.

Petitioners have collected ample historical evidence that Chief Justice Marshall's understanding of the critical distinction between the legislative and judicial functions was widely shared by the founding generation and consistently followed throughout our history. Petr's Brief at 22–25, 29–35. The clearest example of this understanding in the constitutional text is the Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3, which prohibits "trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). That Clause, of course, addressed a specific set of historical abuses under English and early American practice, and this Court's cases have confined its ambit to legislative "punishment." *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). But the Court has also made clear that the Bill of Attainder Clause does not exhaust the requirement of legislative generality. As this Court said in *Brown*, "the Bill of Attainder Clause not only was intended as one implementation of the general

principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons." *Brown*, 381 U.S. at 445.[20]

These concerns about legislative trials are no less salient when Congress acts to disadvantage particular persons in particular cases, even when those disadvantages do not qualify as "punishment" for attainder purposes. The legislative process is designed primarily to identify and vindicate the majority will, not provide due process for the minority.[21] As Justice Powell pointed out in *INS* v. *Chadha*, 462 U.S. 919 (1983), "[t]he Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the "tyranny of shifting majorities." *Id.* at 961 (Powell, J., concurring in the judgment). He concluded that "trial by a legislature lacks the safeguards necessary to prevent the abuse of power." *Id.* at 962.

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[20] *See also Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 241-43 (1995) (Breyer, J., concurring in the judgment) (observing that the principle of legislative generality is expressed both in the Bill of Attainder Clause *and* "in the Constitution's 'general allocation of power'") (quoting *INS* v. *Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring in the judgment)).

[21] *See, e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring in the judgment) ("Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights.").

This requirement of legislative generality is our primary safeguard against any number of oppressive legislative actions, and it is reflected in a number of other constitutional provisions. As Justice Scalia has explained

> What assures us that those limits [of humane treatment] will not be exceeded is the same constitutional guarantee that is the source of most of our protection-what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day, none of which horribles are categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.[22]

These safeguards are defeated if Congress may single out highly-specific applications for its laws.

The form of § 8772, which mandates relief in a single case for specific plaintiffs for claims brought under generally applicable principles of tort, raises a further problem. If Congress may specify special relief in particular cases, or set aside generally applicable defenses or limitations on remedies for particular litigation, then it may undermine the

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[22] *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring). *See also* Araiza, *supra* note 2, at 1089-1106 (discussing various constitutional requirements of generality).

generality even of laws phrased in general terms. No one would dispute that the laws prescribing liability for terrorist atrocities or the general prohibition on reaching assets through multiple financial intermediaries are general laws. But if Congress is permitted to amend those laws to exempt only particular persons in particular cases, then it can destroy the initial evenhandedness of those enactments. One may doubt, for example, whether Congress will pierce the protections of foreign central banks not directly holding assets in the United States as they pertain to countries with whom the United States is on good terms. No law is general if Congress may pick and choose when litigation under it will succeed and when it will fail.

This Court's decision in *Nixon* did reject a claim that *any* legislation directed at a single person is necessarily unconstitutional, denying that the Clause "limit[s] Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." 433 U.S. at 471. As Petitioner rightly points out, the law at issue in *Nixon* applied to a wide range of potential cases concerning President Nixon's papers, not just a single litigation. Moreover, *Nixon* was an extraordinary case in which the subject of the legislation "constituted a legitimate class of one." *Id.* at 472. Decisions by the courts of appeals have likewise recognized that sometimes Congress may legislate with respect to a legitimately unique problem (although these cases typically govern more than one potential *case*). In *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), for example, the D.C. Circuit found that legislation specific to the World War II memorial on the National Mall was legitimately

confined to "a unique public amenity." *Id.* at 1097. What is required is some account of why the legislation is so confined. Courts may accord substantial deference to such accounts while still requiring that they be either articulated or inferable from the circumstances.

There are, of course, other sorts of instances in which Congress acts in a way directed at particular individuals or entities or even at particular litigation. Since the beginning of the Republic, for example, Congress has enacted "private bills" that may pay a judgment against the United States, waive the United States' sovereign immunity, or release the Government's own claims. But these circumstances are quite different from legislation aimed at resolving a single case. First, all of them involve the exercise of either Congress's Article IV power to "dispose" of government property or its general implicit authority to regulate the United States' own conduct in litigation—neither of which is a general legislative power and may be subject to less stringent requirements of generality.[23] Second, as Petitioners point out, these sorts of private bills typically involve public rights over which Congress typically has broad discretion, *see* Petr's Brief at 41; we are unaware of any private bills altering the outcome of litigation between private parties. Third, many private bills operate to facilitate litigation—not to direct its outcome. Bills to pay judgments operate to permit recovery after litigation has ended; waivers of government claims will typically occur prior to its

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[23] It is worth noting that both *Nixon* and *National Coalition to Save Our Mall* likewise involved the disposition of government property.

commencement; and neither undermines the rights of private litigants. Finally, private bills to pay judgments (and arguably bills to waive sovereign immunity) are enacted in service of another constitutional mandate, which is that public expenditures must be pursuant to "Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7. That principle surely permits, and sometimes requires, a greater degree of specificity than regulatory legislation specifying the rights and duties of private actors.

In *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), this Court declined to consider a legislative generality challenge to a federal statute on the ground that it had not been properly presented to the court of appeals and not advanced by a party in the Supreme Court. *See id.* at 441. Even if the Court had reached the question, the statute in *Robertson* applied by its terms to a significant swath of important federal lands over a significant period of time, and it governed all controversies pertaining to timber sales on those lands and in that time period. Moreover, the limited scope of the timber compromise was determined, in significant part, by the limited habitat of the northern spotted owl. The present litigation presents a much clearer case.

B. Section 8772 violates the principle of legislative generality.

This case squarely presents the question that the Court reserved in *Robertson*. As § 8772(b) makes clear, the Act applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern

District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." Section 8772(c) then clarifies that the Act does not "affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b)." The act is not simply a general rule that is intended to influence a pending case; rather, it only *applies* to a single pending case. Even if other cases are indistinguishable in terms of their facts or the legal claims at issue, § 8772 cannot apply.

This case illustrates the wisdom of the Framers' insistence on legislative generality. Petitioner—the national bank of a nation that has branded America "the Great Satan" and carried out any number of reprehensible acts against its citizens—is hardly popular in Congress; it is eminently understandable why Congress might wish to impose unique disadvantages upon it. And Respondents here, the victims of tragic injuries, are highly sympathetic; compensating them is a laudable public purpose. But in a nation that treasures its commitment to the rule of law, the dispute here must be resolved according to neutral principles. If Congress were simply to take resources from the Bank in order to compensate Respondents, for example, it would be obliged to pay compensation. *See* U.S. Const. amdt. V.[24] Having elected instead to let Respondents seek compensation through private

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[24] *See also Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1071-72 (1992) (Stevens, J., dissenting) (emphasizing that Takings law has "frequently looked to the *generality* of a regulation of property") (emphasis in original); *accord Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987).

litigation, Congress may not effectively render its own verdict by specifying a rule to govern only this single case.

It is true, of course, that legislatures constantly draw distinctions and classifications among persons subject to the law. And when they do so, they need not always adopt a general principle and follow it to its logical conclusion; rather, "the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). Even then, of course, the classification must be rational and non-arbitrary. *Id.* at 488. But where the legislative classification confines the law's effect to a single *case*, pending in the federal courts, additional concerns of separation of powers come into play. In that area, this Court has insisted upon "prophylactic" rules, "establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).[25]

A law confined to a single pending case is a legislative trial, and therefore unconstitutional.

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[25] *Plaut* doubted "[t]he premise that there is something wrong with particularized legislative action." 514 U.S. at 239 n.9. But the law in *Plaut* affected many different cases, not just one, *see id.* at 227, and therefore did not raise the spectre of Congress actually appropriating the judicial function to itself.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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